United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

F 093

No. 21321

EARL TINCH, Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER R. TAFT
1000 Hill Building
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

QUESTION PRESENTED

1. Did the prosecution fail to make available to the appellant and the court evidence within its possession or readily available to it which would have corroborated appellant's testimony of innocence and impeached the credibility of the government's primary witness?

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TABLE OF AUTHORITIES

Cases:

Statutes Involved:

22 D.C.C. § 502

22 D.C.C. § 3204

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21321

EARL TINCH,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The appellant, Earl Tinch, was convicted on both counts of a two-count indictment. On Count One, alleging assault with a deadly weapon in violation of 22 D.C.C. §502, he received a sentence of 8 to 24 months. On Count Two, alleging the appellant carried a dangerous weapon without a license in violation of 22 D.C.C. §3204, he received a one year concurrent sentence. Appellant appeals from said conviction.

STATEMENT OF THE CASE

Government's Evidence

The government presented a bizarre case-in-chief, marked more by what it left out and failed to explain, than by what it proved. The alleged assault took place at 10:30 in the evening. It was preceded, however, by a fight at noon the same day.

The primary government witness, Thomas Davis, testified that at about noon on Sunday, August 15, 1965, he, his brother, his nephew, and two friends from North Carolina were standing across the street from his house at 500 Third Street, N.W., talking. A motor scooter was parked out in front. At that

point, the appellant, who he knew only slightly by sight, came out of the house next door, walked right up to Davis and his friends, pulled out a gun, and fired it twice in the air. R. 5, 18-19. Calmly, Davis told him "stop that noise before someone got hurt." R. 5, 22. The appellant then went back into the house. Ten minutes later, he came out again with his hand in his pocket. As the appellant walked near, Davis hit him in the mouth. The appellant fell to the ground. R. 5. Thereafter, Davis went down after him and kept hitting him. R. 23. At that point two police officers came by in a patrol wagon and broke up the fight. R. 5-6, 25-26. Davis had no explanation for why the shots were fired, or why he hit Tinch in the mouth. He said they had never had any trouble between them. R. 19. When the police arrived, Davis told them about the shots, R. 34-35; however, the police simply told everyone to go home. R. 35. Apparently no crowd was gathered by the shots. R. 22.

That evening, about 10:30, Davis took the garbage out the front door of his apartment house to the garbage cans in the back alley. R. 6. He saw the appellant sitting on his steps across the street. Ibid. As Davis came back in front of the apartment, the appellant was standing across the street. R. 29. There were people sitting in front of both Davis' and the appellant's building. R. 30. As Davis turned to go into

his apartment, the appellant started across the street with a gun in his hand. Ibid. Neither said a word. R. 31. The appellant shot three times. The first two times Davis did not even bother to turn around and look. R. 8-10. Davis turned on the third shot and got hit in the left hip. R. 9-10. After being hit, Davis ran into his apartment where someone, probably his mother, called the police. R. 10, 31-32. Thereafter, as Davis was getting into the ambulance, he saw the appellant standing in the street watching. R. 11.

The government then called Detective Peter King who responded to the reported shooting. R. 39. He stated that Davis identified the appellant as his assailant from the ambulance. R. 41. He then arrested the appellant. Ibid. Although both men and women were in Davis' apartment when King responded to the call, he did not get their names. R. 42. He could not recall whether he, or the other officers with him, obtained either statements or names and addresses of any witnesses to the shooting incident. R. 42-43. No gun was found. R. 41.

It was stipulated that the appellant did not have a license to carry any dangerous weapons. R. 47. It was further stipulated that Dr. Masood would have testified that Davis was treated for two puncture wounds in his upper right thigh.

Since there were no powder burns, the doctor was unable to determine whether it was a gunshot wound. R. 91. This medical report was confusing, since Davis had testified he was shot in the left hip. R. 9. Detective King corroborated that the wound was in the "left buttocks." R. 40.

In rebuttal, the government called Helen Stroman who testified that she was the only one on the front steps of Davis' apartment house when he came out to empty the garbage. R. 93, 101. As Davis came back, she saw the appellant coming across the street with his hand in his shirt. R. 93. She immediately ran inside and heard, but did not see, three shots fired behind her. R. 94-95. She gave her name to a detective that evening but did not give a statement as to what she had seen. R. 100.

Appellant's Evidence

The appellant took the stand. He testified that on Sunday morning, August 15, 1967, he was in his house when he heard a woman scream someone was trying to take the appellant's motor scooter which was parked in front of the house next door. R. 54. The appellant went out, saw that no one was messing with it, and turned to go back in. Thereupon Davis and his brother came into the yard and started to beat him up. R. 54.

The appellant was knocked unconscious. R. 57. He came to just as two policemen were breaking up the fight and helping him up. R. 58. The appellant said he never fired any shots in the air, did not own a gun, and did not hear Davis tell the police about any shots. R. 55. Five minutes or so after the fight, Davis and his friends returned with guns and started pointing them at the appellant's kids in the front yard. Later that afternoon, the appellant went down to the police station and tried to swear out a warrant for Davis, but the police refused to accept it. R. 69.

The appellant testified that in the evening he sat out on his front steps until he went to bed at 9 p.m. R. 59, 62-63. He was awakened at about 10:30 by a big commotion out in the street. R. 63. Dressed only in shoes and pants, he went out to see what was going on. R. 64. An ambulance was in the street along with a big crowd. R. 64-65. The police first tried to get in the house next door, then came over, saw the appellant, and arrested him. R. 65.

Appellant's wife, Shirley Tinch, testified that she was in the front yard at noon that day when Davis was telling her husband: "This cat thinks he is cute because he got a new motorcycle." R. 78. The appellant turned to return to the house when Davis and his brother attacked him. R. 75. Shirley Tinch testified she knocked a knife out of the brother's hand

just before the police came. R. 75. She corroborated her husband's testimony that Davis and his friends returned with guns, aimed them at her kids in the yard, and that she and her husband tried to file a complaint with the police. R. 75, 82-84. She also testified that they were both in bed when the ambulance arrived and her husband went down to see what was going on. R. 76. She heard no shots. R. 85.

SUMMARY OF ARGUMENT

The appellant contends that he is entitled to a remand of the case at bar for a full hearing in the trial court to determine whether or not the prosecution failed to make available to the appellant evidence corroborating appellant's testimony and impeaching the credibility of the government's main witness, Thomas Davis. The undisputed facts are equally consistent with appellant's innocence as guilt. The controverted facts include at crucial points the involvment of police officers and relatives of the victim of the alleged assault, Thomas Davis, none of whom were called as witnesses although peculiarly within the control of the prosecution and not the defense. In addition, the testimony of Thomas Davis fails to explain either the motive for appellant's alleged assault or certain of his conduct consistent only with innocence. On the

basis of this record, a remand for a hearing on evidence in the government's possession is the only remedy that can assure that appellant's conviction was in accord with due process of law.

ARGUMENT

Prosecution Failed to Make Available Police Records and Witnesses With Information Relevant to the Merits

The facts in the case at bar present one serious question -- namely, was the appellant framed by the prosecution's primary witness, Thomas Davis. The only direct evidence that the appellant shot him was Davis' own testimony. This fact is vigorously denied by the appellant and his wife. Moreover, Davis' story leaves open several highly incredible circumstances. First, Davis is completely unable to attribute a motive for the noon or evening attack by the appellant. He testified that they hardly ever talked to each other and that there was no trouble between them. On these facts, nothing short of lunacy would explain appellant's alleged conduct in the full view of many witnesses, including his own wife and kids. Second, Davis testified, corroborated by Detective King, that the appellant was standing clearly visible to Davis and the police while Davis was being placed in the ambulance. This is highly abnormal conduct for a man who is supposed to have shot

Davis, face to face, only minutes before. Finally, there is the completely unexplained contradiction between the medical testimony, Davis, and King as to where Davis was wounded.

Under such circumstances, full disclosure of all available corroborative evidence is vitally important to assure that a miscarriage of justice is not being perpretrated. On this issue, appellant contends that the prosecution had substantial evidence in its possession which was not made available to either the appellant or the court which would either cast substantial doubt on the credibility of Davis or supported appellant's testimony.

First, Thomas Davis testified that the appellant was firing a gun in the air at noon on Sunday in front of appellant's own house in a residential area. Davis identified four other witnesses to this occurrence, and testified that in their and the appellant's presence he informed the police of this occurrence within minutes after it occurred. The prosecution neither substantiated nor denied this testimony although these officers are presumably available along with any reports they made of the incident.

Second, the appellant and his wife testified that during the afternoon of August 15, 1967, they had attempted to file a complaint with the police to the effect that Davis and his friends were carrying guns and aiming them at appellant's children playing in the yard.

Third, Davis testified that several police officers responded to the shooting incident in the evening although he only remembered Detective King. R. 32-33. Detective King testified that he and his partner responded to the call along with possibly other officers outside of Precinct No. 1. R. 43-45. King had no idea what witnesses or statements these other policemen obtained. R. 43. This issue became important in view of the fact that Davis testified there were a number of people outside his apartment at the time of the shooting, R. 32, whereas the only rebuttal witness, Helen Stroman testified that she was the only one and that she never gave any statement to the police at the time.

Finally, Davis' brother and nephew, both of whom lived in Washington at the time of trial, R. 14, were not called to corroborate Davis on the noon attack. Since Davis was the victim of the alleged attack and their close relative, they were available to the prosecution rather than the appellant to be called as witnesses.

These many gaps in the prosecution's case were so evident that the trial judge was prompted to remark:

> "THE COURT: Now the thought occurred to me and I'd like some discussion about this. There has been something mentioned in this case about the complaining witness, Davis's brother and two or three other people having been present on the morning when the argument ensued and when he hit this man, knocked him down. I think you examined about where these people were, etc., right?

"MR. GARBER: Yes, sir.

"THE COURT: Now the jury may be wondering where these people are to throw some light on the nature of the argument as to who was the aggressor or the reason for the fight. It seems to me this might be an appropriate case to give the missing witness rule.

"MR. GARBER: I think it would, Your Honor.

"THE COURT: Because I am in the dark as to what happened that morning other than what the complaining witness said.

"MR. NUNZIO: Only thing I can say that was not the charge here.

"THE COURT: I understand, but it may have led up to it, may have been a connecting link what happened in the morning and afternoon, don't you see? I don't think it is too important but I thought probably it might be important to the jury. . . ." R. 103-04

In this court, the appellant contends that the missing witness instruction was not enough and that the prosecution had the obligation to come forward with the evidence in its possession or easily available to it. In Ellis v. United States, 120 U.S.App.D.C. 271, 345 F.2d 961 (D.C. Cir. 1965), this court remanded a similar case where the prosecution had in its possession evidence highly material to the possible innocence of the defendant. There, the defendant fought with the victim and hit him on the head with a board on June 30, 1963. The victim was found dying a week later with a fractured skull.

The defendant was convicted of manslaughter. At the trial the defendant testified that he was informed by the police that the victim was released from the hospital the same night of the fight on June 30 and was picked up for drunkenness the night he died. The court held that on the basis of this testimony, the prosecution had the obligation to come forward with the hospital records and other exculpatory evidence. The court stated in its per curiam opinion:

> "If the police or prosecutor knew of evidence that appellant's blow might not have been the proximate cause of Wilson's death, there might be a due process issue under Brady v. State of Maryland, 373 U.S. 83 . . . (1963)." 345 F.2d at 962.

In a concurring opinion, Judge Bazelon wrote:

> "If the police did have such information or if the prosecutor failed to bring it forward at trial, even believing in good faith that the information was unreliable or legally inadmissible, appellant's due process rights would have been violated." Id. at 961.

This Circuit reaffirmed this rule in Levin v. Katzenbach, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), cert. denied, 379 U.S. 999, 85 S.Ct. 719, 13 L.Ed. 2d 701 (1965), 363 F.2d 287 (D.C. Cir. 1966).

Although the prosecution might argue that it was within the power of the appellant to subpoena the police witnesses and related documents, such an answer is insufficient. In Ellis, the defendant testified that the police themselves told him of the withheld evidence at the time of his arrest -- namely, that they had picked up the victim for drunkenness the night he died and also knew of the victim's hospital sojourn. See 345 F.2d at 962. In spite of this, the case was remanded for a hearing, and Judge Bazelon noted in his concurring opinion:

> "It was incumbent on the Government to rebut appellant's allegation that the police had material exculpatory information." Id. at 963 n.2.

In the court below, the prosecution seemed to argue that the events at noon on August 15, 1965, and appellant's allegation that he tried to swear out a warrant were "not the charge here." R. 103. The court, however, clearly viewed these events as relevant. R. 103-04. And as the Supreme Court held in Griffin v. United States, 336 U.S. 704 (1949), the defendant is entitled to a new trial even though the exculpatory evidence in question was withheld by the prosecution in the good faith belief that it was inadmissible and irrelevant.

In the case at bar, appellant does not contend that any one of the above enumerated failures of the prosecution to make evidence available to the appellant would justify a remand and hearing in the trial court. For invariably pertinent witnesses or police officers present at the time of the crime or arrest are not called since often their testimony is cumulative. However, in the case at bar, the sheer number of failures combined with evidentiary and logical gaps in the case-in-chief cannot help but raise substantial doubt as to the truth of Thomas Davis' testimony. For, the facts in the case, many of which are undisputed, suggest an alternative possibility -- namely, that Davis and his friends were fooling around with guns early in the day on August 15, 1965, that later that evening Davis was wounded in a fight or accident with them, and, rather than incriminate a friend or relative, Davis pointed the finger at the appellant with whom he had a minor scuffle earlier that morning. Clearly, if the police who broke up that fight at noon deny Davis told them of shots fired in the air and if the appellant did in fact try to file a complaint that afternoon charging that Davis and his friends were aiming guns at his children, then appellant's testimony at trial would receive substantial corroboration. Such

corroboration would indeed meet the test of prejudice set forth in Levin v. Katzenbach, 119 U.S.App.D.C. 156, 363 F.2d 287, 291 (D.C. Cir. 1966), to the effect that:

> "[A]ppellant would be entitled to relief in the present case if the government failed to disclose evidence which, in the context of this case, might have led the jury to entertain a reasonable doubt about appellant's guilt."

CONCLUSION

For the foregoing reasons, appellant moves this court to remand the case for a further hearing in the trial court to determine whether or not the prosecution did in fact fail to make evidence in its possession available to the appellant which would substantially corroborate appellant's testimony at trial and/or impeach the testimony of Thomas Davis.

Respectfully submitted,

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Counsel for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,321

EARL TINCH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
NICHOLAS S. NUNZIO,
JOEL M. FINKELSTEIN,
Assistant United States Attorneys.

Cr. No. 1116-65

QUESTION PRESENTED

In the opinion of appellee, the following question is presented:

Whether appellant is entitled to a hearing to determine whether the prosecutor unlawfully withheld or failed to disclose information prior to or during trial where appellant points to no facts within the prosecutor's knowledge that were withheld prior to or during trial but simply speculates on the basis of what appears in the record that the prosecutor had facts in addition to those introduced as evidence and that such facts, if disclosed, might have affected the result.

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TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,321

EARL TINCH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged by indictment filed October 4, 1965, with one count of assault with a dangerous weapon, a pistol (in violation of 22 D.C. Code § 502), and one count of carrying a dangerous weapon without a license (in violation of 22 D.C. Code § 3204). On October 15, 1965, appellant pleaded not guilty to each of the counts. He was tried before a jury and Judge John J. Sirica and on December 21, 1966 was found guilty as charged in the indictment. On June 29, 1967, appellant was sentenced to 8 to 24 months under count one and one year under count two, the sentences to run concurrently.

The Government's case.

The complainant, Thomas Davis, who on August 15, 1965, resided at 500 Third Street, Northwest, testified that sometime between 11:30 a.m. and noon on August 15, 1965, he, his brother and two friends from North Carolina were standing across the street from the apartment building in which he lived (Tr. 4, 13). He said, as they talked, appellant, who lived in a rooming house across the street from his (Davis') apartment, walked out of his rooming house, pulled a gun, and fired two shots in the air (Tr. 5, 18, 20). Davis said he told appellant to stop the noise, and appellant returned to his house (Tr. 5). A few minutes later, so Davis testified, appellant again emerged from his house and, with his hand in his pocket, walked toward Davis (Tr. 5, 19). Davis said he then struck appellant and, as he and appellant fought, two officers arrived in a patrol wagon and told him and the others to go home, which they did (Tr. 5-6, 19, 26).[1]

At about 10:30 p.m. that evening, so Davis continued, Davis left his apartment and walked into the alley adjacent to his building to empty the garbage (Tr. 6, 28). Davis stated that appellant was seated on the porch of the rooming house across the street and, as he (Davis) emerged from the alley after throwing out the trash, he observed appellant with a gun in his hand in the street walking toward him (Tr. 6-8, 29-30). Davis noticed that appellant was wearing brown khaki pants and a plaid or checkered shirt (Tr. 35). Davis said that he (Davis) kept walking, turned toward the front door of his building, and heard three shots (Tr. 8). The first two rounds, he said, missed but the third hit him in the left hip passing completely through his flesh (Tr. 9, 31). He stated that between the second and third shots he looked back and saw appellant aiming the gun in his direction (Tr. 9). Hit by the third round, Davis ran into his apartment (Tr. 10-11). Davis' mother, sister, and girlfriend were

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[1] Davis said he told the officers appellant had fired two shots in the air (Tr. 34).

there (Tr. 15). He said he thought his "mother or someone" called the police. Davis testified that some ten or fifteen minutes later, after the police and an ambulance arrived, he saw appellant in the street wearing khaki pants but no shirt (Tr. 11).

The Government then called Detective Peter King of the Metropolitan Police Department assigned to the First Precinct (Tr. 35). Detective King testified that at about 10:35 p.m. on August 15, 1965, he responded to a report of a shooting in the 500 block of Third Street, Northwest (Tr. 39). He said he went to Davis' apartment, spoke to Davis in his apartment, and observed that Davis appeared to be suffering from a gunshot wound in his left buttocks (Tr. 40, 42). Upon learning from Davis that appellant was Davis' assailant and that appellant lived across the street, Detective King left Davis' apartment in search of appellant (Tr. 42). A large crowd of about 40 or 50 people had gathered outside. Apparently Detective King was unable to find appellant right away for he did not arrest appellant until Davis was in the ambulance and identified appellant, who was standing amongst the crowd that had gathered in the street (Tr. 40-41, 43). Appellant was wearing khaki trousers but no shirt (Tr. 44). Detective King searched appellant but found no weapon (Tr. 44).

Following Detective King's testimony, the Government and appellant stipulated that on August 15, 1965, appellant did not have a license to carry a pistol in the District of Columbia (Tr. 46-47). Subject to the right to call the physician who examined and treated appellant's wound, the Government rested (Tr. 47-48).

Appellant's case.

Appellant testified on his own behalf. He said that he lived in and operated a rooming house at 505 Third Street, Northwest (Tr. 49). Initially, appellant, apparently referring to the noon incident of August 15, stated he saw Davis and several others standing in the yard next door (Tr. 49-50). Appellant said, however, that he did not

leave his house that day except "to go and drink whiskey" that morning and that he did not talk with Davis (Tr. 50). At this point in his testimony, he denied there was an altercation between him and Davis (Tr. 51). Later, presumably referring to the noon incident, appellant testified that he had just come back to his house when he heard a lady screaming that some fellows were in his yard trying to steal his motor scooter (Tr. 54, 56). He said he went outside and Davis and his brother jumped a fence and began to beat him (Tr. 54, 57). He testified that Davis held a razor to his (appellant's) neck (Tr. 54, 58). He testified later that Davis' companions were armed with shotguns and pistols (Tr. 68). According to appellant, his two-year-old child, upon trying to help him, was cut on the hand as Davis threw the razor to the ground (Tr. 55). Appellant said two policemen soon arrived, broke up the fight, and sent them home (Tr. 55).[2]

Turning to the evening of August 15, appellant testified that at around 10:00 p.m. he "was half drunk" (Tr. 51). He said, however, he went to bed around 9:00 p.m., and was awakened around 10:30 p.m. by his wife (Tr. 63, 64). Aroused by the noise of people in the street, he went outside to see "what was going on" (Tr. 51). He said he did not hear any shots fired (Tr. 63). He testi-

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[2] On cross-examination appellant said he did not immediately tell the police Davis held a razor to his throat because he was unconscious when the police arrived. When he regained consciousness, he then informed the police that Davis held a razor to his throat (Tr. 58-59).

Appellant testified that Miss Anniebelle, an elderly woman who lived in the basement apartment of his rooming house, took him to her apartment after the fight where she tended to him. He then went to his apartment where he rested. (Tr. 60-61.) According to appellant, about five or six minutes after the fight, Davis and his companions returned and pointed guns at his (appellant's) children who were sitting in the yard (Tr. 68-69). He testified that he reported this incident to the police at the First Precinct but, because August 15th was a Sunday, he was told to return the next day so that a warrant could issue. (He did not return the next day because he was arrested that evening). He stated that he went to the precinct with his wife (Tr. 69).

fied that the police were in the street with two dogs, that they went to the house next to his and were directed to another house where they broke down the door and turned the dogs loose inside (Tr. 52). As appellant put it, "they kept fooling and fooling around and then finally approached my house and they were going to kick my door down. I said, 'You don't have to kick that door open, I'll open the door.' So I opened the door with the keys" (Tr. 52). Appellant said he was placed under arrest when four or five plainclothesmen grabbed him (Tr. 52).

He denied shooting Davis or owning a gun (Tr. 71).

Shirley Ann Tinch, appellant's wife, then testified. Presumably referring to the noon incident of August 15, she said that she saw Davis say something to appellant about appellant's motor scooter, and observed that, as appellant turned to enter his house, Davis and his brother jumped appellant (Tr. 74-75, 77-79). She stated that Davis' brother pulled a knife, and testified that, as he was getting ready to stab appellant, she knocked the knife from his hand (Tr. 74, 80). On cross, she said Davis had a razor but stated she did not see him hold it to appellant (Tr. 80-81). According to Mrs. Tinch, as Davis' brother was about to pick up the knife, two policemen arrived one of whom said, "they got you this time, didn't they, Earl?" (Tr. 75).[3]

She further testified that Davis and his companions then drove off and later returned, went into Davis' apartment, and aimed guns out of the window across the street at her children, appellant and her (Tr. 75). At this time, so Mrs. Tinch testified, appellant was sitting on the steps of his rooming house (Tr. 83).[4]

She said she and appellant went to bed between 8:30 and 9:00 p.m. and, when they heard the excitement outside, they went out to see "what it was" (Tr. 76). She

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[3] Mrs. Tinch testified that when the police arrived, appellant got up and went into their apartment where he rested (Tr. 81-82).

[4] Mrs. Tinch testified that she and appellant went to the First Precinct to make a complaint but that the police would not accept it (Tr. 84).

said she woke her husband when the ambulance arrived, and denied hearing shots fired (Tr. 86).

She said appellant did not have a gun (Tr. 76, 85).

Following Mrs. Tinch's testimony the Government and appellant stipulated to the testimony of Dr. Masood who treated Davis at Casualty Hospital on the evening of August 15, 1965. The parties stipulated that Dr. Masood would have testified that he treated Davis at about 10:30 p.m. on the evening of August 15, 1965 for two puncture wounds in the upper third of his right thigh and that, because there were no powder burns, he was not sure if the punctures were a gunshot wound (Tr. 91).

The Government's case in rebuttal

The Government called Helen Stroman as a rebuttal witness (Tr. 90). Mrs. Stroman resided at 500 Third Street, Northwest, and knew Davis (Tr. 92). She testified that at 10:30 p.m. on the evening of August 15, 1965, she was sitting on the front porch of her apartment and saw Davis leave his apartment building to empty trash (Tr. 93). She further testified that she saw appellant come across the street and, as Davis returned to the street after emptying the trash, she observed appellant put his hand underneath his shirt at which time she turned to go into her apartment. She said she then heard three shots. (Tr. 93-94.) She stated she did not see who fired the shots and upon hearing the shots she ran into her apartment (Tr. 95).

This concluded the presentation of evidence.

STATUTE INVOLVED

Title 28, United States Code, Section 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

SUMMARY OF ARGUMENT

Appellant argues that he is entitled to a hearing to determine whether the prosecutor unlawfully withheld or failed to disclose information before or during trial. First, we think appellant has addressed his request for a hearing to the wrong court. We think appellant's request should be addressed to the District Court so that we may consider the option of rebutting his speculative assertion with tangible evidence.

Second, in any event, we do not think appellant has alleged facts which entitle him to a hearing. Appellant points to no facts within the prosecutor's knowledge that were not disclosed prior to or during trial. He simply speculates on the basis of what appears in the record that the prosecutor had facts in addition to those introduced as evidence and that such facts, if disclosed, might have affected the result. We think more than this is needed to support a request for a hearing.

ARGUMENT

I. Appellant is not entitled to a hearing to determine whether the prosecutor unlawfully withheld or failed to disclose information prior to or during trial.

(Tr. 5-9, 15, 18-20, 26-30, 40-44, 50-52, 54-61, 63, 74-82, 86, 93-95)

Appellant argues that he is entitled to "a full hearing in the trial court to determine whether or not the prosecution failed to make available to . . . [him] evidence corroborating . . . [his] testimony and impeaching the credibility of the Government's main witness, Thomas Davis." Appellant's Brief at 6.

First, we think appellant has filed his request for a hearing in the wrong court. Appellant does not seek reversal of his conviction, the type of relief traditionally requested on appeal from a criminal conviction; rather, he asks this Court to order a hearing to determine if a re-

versal is required. A request for a hearing to determine whether the prosecutor unlawfully withheld or failed to disclose information is, we think, a matter to be determined initially by the District Court. See e.g. *Smith* v. *United States*, 358 F.2d 683 (3rd Cir. 1966); *United States* v. *Pheribo*, 346 F.2d 559 (2d Cir.), *cert. denied*, 382 U.S. 871 (1965). To be sure, this Court is not powerless to order a hearing as requested by appellant, and we do not so argue. See 28 U.S.C. § 2106; *Ellis* v. *United States*, 120 U.S. App. D.C. 271, 345 F.2d 961 (1965). But because appellant has presented his request for a hearing to this Court and not the District Court, we do not have the opportunity, if we so desire, to answer his speculative assertions with tangible evidence. In short, we are required to argue that a hearing is not warranted and are precluded from weighing the option of submitting evidence to the court to lay to rest appellant's speculative assertions.

Second, in any event, we think appellant's request for a hearing is completely groundless. Because appellant has characterized the Government's case-in-chief as bizarre[5] and relies to a large degree on this characterization in requesting relief, we think it appropriate before turning directly to appellant's argument to review in brief some of the testimony below and put the record in what we believe to be its proper prospective.

On the morning of August 15, 1965, appellant, who had been drinking, returned to his house and heard a lady screaming that several men were in his yard trying to steal his motor scooter (Tr. 50, 54, 56). Appellant ran outside and saw Davis and his companions in the yard next door and took them to be the men who were seen tampering with his motor scooter (Tr. 56). So much was established through appellant's own testimony. According to Davis, appellant came out of the house, pulled a pistol, and shot twice into the air. (Tr. 5, 18, 20). Ap-

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[5] Appellant's Brief at 1.

pellant went back into the house, emerged again a few minutes later and, as he approached Davis with his hand in his pocket, Davis struck him (Tr. 5, 19).

In an effort to question the testimony supporting his conviction, appellant claims "nothing short of lunacy would explain . . . [his] alleged conduct." [6] We think the testimony establishes a logical sequence of events. The record reflects that appellant, somewhat under the influence of alcohol, reacted to what he thought was an attempt by Davis and his companions to steal his motor scooter, and that Davis subsequently struck appellant either to protect himself from what he thought might be an assault or in retaliation for appellant's apparent threat.

Later, in the early evening, appellant, while sitting on the porch of his rooming house, saw Davis leave his apartment and walk into the alley to the rear of Davis' building to empty trash. Appellant then walked [redacted] into the street, pulled a gun, and, as Davis emerged from the alley and began to walk toward the entrance of his apartment, appellant fired three shots hitting Davis once in the left hip. So much was established through Davis' testimony and was corroborated in significant respects by the testimony of Mrs. Stroman, a neighbor who observed Davis' and appellant's movements just prior to the shooting and heard three shots fired (Tr. 6-9, 28-30, 93-95).[7] Contrary to appellant's assertion, we think the record reflects that appellant had ample motive for the shooting. Appellant apparently thought Davis attempted to steal his motor scooter earlier that day and may have also been angered by the altercation that took place between him and Davis.

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[6] Appellant's Brief at 7.

[7] Appellant seeks to make something of Davis' and Detective King's testimony relating that Davis was shot in the left hip, while Dr. Masood, as the stipulation revealed, would have testified that he treated appellant for puncture wounds in the right thigh. This testimony reflects only that the witnesses did not agree or what is right and what is left and does not detract from the fact that appellant suffered from a bullet wound on the evening of August 15, 1965.

Appellant claims that his presence in the crowd several minutes after the shooting where he could be identified by Davis who was placed in an ambulance is inconsistent with his alleged guilt. But Davis saw appellant shoot him and Davis knew appellant lived across the street from his apartment. Appellant, we think, must have known this. From whom was he to hide?

Appellant's abortive attempt to establish a defense is, we submit, what makes for the incoherence in the record. Both appellant and his wife denied hearing shots fired on the evening of August 15, 1965 (Tr. 63, 86). They testified that they were aroused by the noise of people in the street and went outside out of curiosity (Tr. 51, 76). This, of course, is completely inconsistent with Davis' and Mrs. Stroman's testimony. In addition, appellant's testimony describing his arrest is not entirely consistent with Detective King's testimony (see Tr. 52; compare Tr. 40-44). Moreover, there are material discrepancies between appellant's version of his noon altercation with Davis and his wife's version of the same event (see Tr. 54-61; compare 74-82). And neither version coincides with Davis' version of the incident (see Tr. 5-6, 19, 26).

In sum, the record reflects that appellant thought Davis and his companions tried to steal his motor scooter, that appellant threatened Davis and the others by firing a pistol in the air, and that later, in the evening, appellant shot Davis as Davis was returning to his apartment after emptying trash in an alley adjacent to his buliding.

We turn now to appellant's argument that he is entitled to a hearing to determine whether the prosecutor unlawfully withheld or failed to disclose information prior to or during trial. In *Levin* v. *Katzenbach*, 124 U.S. App. D.C. 158, 363 F.2d 287 (1966)[8] and *Levin* v. *Clark*, D.C. Cir. No. 20,682, decided November 15, 1967[9] this Court considered the question of the prosecutor's duty to disclose

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[8] We shall refer to this decision as *Levin I*.

[9] We shall refer to this decision as *Levin II*.

information within his knowledge to a defendant before or during trial. While the Court in *Levin* I and II did not consider the question of when a hearing is required to determine if relief is justified, the Court did set forth the grounds which, if properly pleaded, would establish a basis for a hearing. *Levin* I and II is therefore our starting point.

Levin was convicted of grand larceny [10] and, raising the issue of the prosecutor's duty to disclose information, challenged his conviction by way of collateral attack. In *Levin* I, the Court stated (124 U.S. App. D.C. at 161, 363 F.2d at 290):

> Relief would be available, of course, had the government deliberately presented a false picture of the facts, either by knowingly using perjured testimony, failing to correct testimony when it became apparent that it was false, or actively suppressing evidence known to be exculpatory [Footnotes omitted].

Continuing, the Court announced another ground that would warrant relief and held (124 U.S. App. D.C. at 162, 363 F.2d 291):

> [A]ppellant would be entitled to relief . . . if the government failed to disclose evidence which, in the context of this case, might have led the jury to entertain a reasonable doubt about appellant's guilt. Such a failure may be classified as negligence.

Then, in *Levin* II, the Court expanded on its holding in *Levin* I and wrote (Slip op. at 4):

> The Government's facilities for discovering evidence are usually far superior to the defendant's. This imbalance is a weakness in our adversary system which increases the possibility of erroneous convictions. When the Government aggravates the imbalance by failing to reveal evidence which would be helpful to

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[10] *Levin* v. *United States*, 119 U.S. App. D.C. 156, 338 F.2d 265 (1964), *cert. denied*, 379 U.S. 999 (1965).

> the defendant, the constitution has been violated. [Footnote omitted].

By speaking of "evidence which would be helpful," the Court did not abandon the standard announced in *Levin* I —whether the evidence "might have led the jury to entertain a reasonable doubt about [defendant's] guilt." Referring to this standard, the Court noted that it required "speculation" and thus should not be applied "harshly or dogmatically." Slip op. at 5. To be considered, the Court said, is "whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have been shifted." Slip op. at 5. Against this background, the Court cautiously warned in *Levin* I, 124 U.S. App. D.C. at 162, 363 F.2d 291:

> [W]e do not suggest that the government is required to search for evidence favorable to the accused, or to disclose all its evidence, however insignificant, to the defense.

Thus, if appellant points to information within the prosecutor's knowledge which the prosecutor failed to disclose prior to or during trial—information which may have affected the result—he is entitled to a hearing. But appellant cannot, as he has done here, trigger the court's duty to hold a hearing by pleading his claim in conclusory terms.[11] He must point to facts—facts which may have affected the result—which the prosecutor failed to disclose prior to or during trial, or at the very least, establish a basis for a reasonable belief to the same effect. See *Griffin* v. *United States*, 103 U.S. App. D.C. 317, 258 F.2d 411, *cert. denied*, 357 U.S. 922 (1958); *Smith* v. *United States*, 358 F.2d 683 (3rd Ciir. 1966); *United States* v. *Angelet*, 255 F.2d 383 (2d Cir. 1958); *Sanders* v. *United*

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[11] Because appellant seeks nothing more than a hearing, we treat his brief as a petition filed in District Court under 28 U.S.C. § 2255.

States, 183 F.2d 748 (4th Cir.) *cert. denied*, 340 U.S. 921 (1950). Thus, appellant's general allegation that the prosecutor "had substantial evidence in [his] possession which was not made available to either the appellant or the Court which would either cast substantial doubt on the credibility of Davis or supported appellant's testimony" [12] is totally defective, for it is nothing more than a bare conclusion.

Appellant's allegation that the Government failed to corroborate Davis' testimony relating the noon incident and the fact that Davis informed the officers who broke up the altercation between him and appellant that appellant fired two shots into the air is similarly defective. It does not support the inference that the prosecutor had information in addition to that introduced as evidence,[13] much less information inconsistent with Davis' testimony.[14]

Nor does appellant's allegation that the Government failed to corroborate appellant's and his wife's testimony relating that they attempted to file a complaint at the First Precinct against Davis and his companions on the day of the assault set forth grounds warranting a hearing. First, we note that the Government did not dispute the fact that appellant and his wife sought to file such a complaint. We do not think the Government is charged with the obligation of corroborating defense testimony of

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[12] Appellant's Brief at 8.

[13] We realize that in some cases facts within the knowledge of the police may be imputed to the prosecutor. See *e.g. Barbee* v. *Warden*, 331 F.2d 842, 846 (4th Cir. 1964). But we do not think facts allegedly within the knowledge of the police can be imputed to the prosecutor where such facts are not critical to the question of innocence or guilt and are not obtained as a result of investigating the crime in question.

[14] We note that appellant, through counsel, could attempt to interview some of Davis' companions who were witnesses to the noon altercation and seek to ascertain the names of the officers who broke up the altercation between Davis and appellant. Through this means appellant might discover what these witnesses would have related if called at trial and whether there is any basis in fact for his allegation here.

the kind involved here when it does not dispute the fact it seeks to establish. Second, it seems to us that it is reasonable to assume that, because the testimony on which this allegation is based was presented by appellant and his wife, the prosecutor had no way to anticipate at trial the introduction of facts concerning an alleged report to the First Precinct involving Davis and his companions. This inference is buttressed by Davis' testimony on cross in which he denied that he and his companions aimed guns at appellant, appellant's wife and children.[15] And third, we do not think police testimony corroborating appellant's and his wife's testimony that they tried to file a complaint at the First Precinct could have possibly affected the result.

And finally, we see nothing in appellant's allegation that in addition to Detective King there were other officers on the scene when appellant was arrested. This allegation does not support the inference that these officers possessed relevant information, much less information inconsistent with Davis' and Mrs. Stroman's testimony relating the circumstances surrounding the assault. Indeed, there is nothing in the record to indicate that these officers talked to anyone who might have witnessed the assault. Detective King testified only that there were other officers present when he interviewed Davis in Davis' apartment and that he did not know whether any of these officers took the names and addresses of the persons inside the apartment (Tr. 43).

In sum, appellant points to no facts within the prosecutor's knowledge that were withheld prior to or during trial; he simply speculates on the basis of what appears in the record that the prosecutor had facts in addition to those introduced as evidence and that such facts, if disclosed, might have affected the result. We think more

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[15] Davis testified on cross that he did not see a shotgun on the day of the incident and that he did not see appellant after the officers broke up the noon altercation until the assault later in the evening (Tr. 15, 26-28).

than this is needed to support a request for a hearing. Compare, *Ellis* v. *United States*, 120 U.S. App. D.C. 271, 345 F.2d 961 (1965).[16]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed and appellant's request for a hearing to determine whether the prosecutor unlawfully withheld or failed to disclose information prior to and during trial be denied.

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[16] In *Ellis*, the defendant was convicted of manslaughter based on evidence that he fought with and struck on the head one James Wilson. Wilson was found a week after the defendant assaulted him lying unconscious on the street and subsequently died of brain injuries. At death Wilson's blood contained 0.25 per cent alcohol. The defendant testified, without contradiction, that the two police officers, who arrested him, told him that Wilson was released from the hospital on the night after the defendant struck him and that Wilson was picked up for drunkenness on the day he died. Noting that the causal connection between the defendant's blow and Wilson's death was attenuated by this testimony, the Court held that the defendant's allegation required "a fuller development of the events which transpired in the week between [defendant's] blow and Wilson's death, and the Government's knowledge of them." 120 U.S. App. D.C. at 272, 345 F.2d at 962.

In *Ellis*, the defendant pointed to facts within the knowledge of the police which, if true, established a basis for a reasonable relief that the prosecutor may have failed to disclose evidence which might have affected the result. The same cannot be said of appellant here.

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